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ADMINISTRATIVE REVIEW

In the matter of the Department of Transportation
Ruling Number 2023-5556
June 15, 2023

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11896. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11896, as found by the hearing officer, are as follows:¹

The Virginia Department of Transportation employed Grievant as a Resident Business Manager at one of its locations. She began working for the Agency on October 10, 2017. Grievant was responsible for the daily oversight of financial, procurement, inventory, and budget programs at a residency. Grievant resigned from the Agency on October 24, 2022.

On March 21, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance. She was given until June 19, 2022 to correct her performance in five areas of concern. Grievant was given a performance plan. When Grievant was reevaluated in July 2022, the Agency concluded Grievant had successfully completed three of the five areas but two remained unsatisfactory. Those two were:

Monitor/track your employees’ performance and behavioral needs and establish specific training goals for your staff.

Empower your team to take ownership of their tasks by requiring them to problem solve issues and only seek assistance when they are

¹ Decision of Hearing Officer, Case No. 11896 (“Hearing Decision”), Apr. 14, 2023, at 2-3 (footnotes omitted).

unable resolve the issue. You must also provide a performance status update during our bi-weekly meeting.

The Fiscal Tech reported to Grievant. She began working for the Agency on May 25, 2022. On July 14, 2022, the Fiscal Tech resigned from her position with the Agency effective that day. The Fiscal Tech met with the HR Consultant to discuss why she was leaving. The Fiscal Tech told the HR Consultant she wanted to discuss why she was leaving with “hopes of preventing the same thing from happening to the next employee we hire.” The Fiscal Tech said that she was leaving because of Grievant’s poor management. The Fiscal Tech said that Grievant gave her a lot of busy work but no real training. The Fiscal Tech said Grievant would give her 30 minutes of work and then the Fiscal Tech was left alone for three or four hours with nothing to do. The HR Consultant tried to get the Fiscal Tech to remain an employee and offered her training in another residency, but the Fiscal Tech refused. The Fiscal Tech did not want to work anywhere near Grievant which could happen if the Fiscal Tech remained in a fiscal position.

In January 2022, Ms. W asked Grievant to approve Ms. W’s request for summer vacation. Grievant did not approve the request. Ms. W had made reservations and needed to know if her leave was approved in order to avoid late cancellation penalties. In June 2022, Ms. W asked Grievant if Grievant would be approving Ms. W’s vacation request. Instead of approving Ms. W’s request for vacation, Grievant asked Ms. W additional questions. Ms. W became frustrated and contacted the Residency Administrator to get the leave approved.

A Superintendent wanted to extend the lease for a motor grader. The Superintendent asked Ms. W to provide assistance. Ms. W asked Grievant how to accomplish the task. Grievant spoke with the shop manager and expressed reluctance to extend the lease since new equipment had been ordered. The Residency Administrator told Grievant to extend the lease since he did not want to lose the motor grader and be without a motor grader if receipt of the new equipment was delayed. Grievant “went back and forth” with the shop manager. The Residency Administrator had to get his assistant to contact the shop manager to have the lease extended.

Grievant alleged she was being treated unfairly and being retaliated against. The Agency’s Human Resources unit investigated the allegations and concluded they were unfounded.

The agency issued to the grievant a Group I Written Notice on August 1, 2022 for unsatisfactory performance.² The grievant timely grieved the disciplinary action, and a hearing was held on February 24, 2023.³ In a decision dated April 14, 2023, the hearing officer determined that the agency had presented sufficient evidence to support the issuance of the Written Notice on

² Agency Ex. 1; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

grounds that the agency was not satisfied with the grievant's performance and interaction with her coworkers.⁴ The grievant now appeals the decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure"⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Delayed Disciplinary Action

The grievant asserts on appeal that the agency took too long to issue the Group I Written Notice, as the Notice of Improvement Needed ("NOIN") "procedurally should have been closed on June 19th." The June 19 date refers to the end of the performance improvement period noted in the March 21 NOIN.⁸ The grievant met with her supervisor on July 8 to discuss her progress in these areas.⁹ An interim evaluation issued on that date indicated that the grievant would receive due process for the unsatisfactory performance noted.¹⁰ Finally, on August 1, the Group I Written Notice was issued.¹¹ While the grievant's concern about the agency's delay in issuing the Written Notice is understandable, there is nothing in DHRM policy that indicates a specific required deadline for an agency to follow an NOIN plan with formal disciplinary action. Most importantly, the delay here was relatively minor and there is no evidence in the record suggesting that the delay itself caused an adverse effect on the grievant. Accordingly, there is no basis for the matter to be remanded as to this concern.

Consideration of Evidence

The grievant challenges the factual determinations made by the hearing officer. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹² and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹³ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹⁴ Thus, in disciplinary actions, the hearing officer

⁴ *Id.* at 4.

⁵ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁶ *See Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ Agency Ex. 19.

⁹ Agency Ex. 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² Va. Code § 2.2-3005.1(C).

¹³ *Grievance Procedure Manual* § 5.9.

¹⁴ *Rules for Conducting Grievance Hearings* § VI(B)(1).

has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.¹⁵ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant asserts that the hearing officer's findings of fact contains "incorrect information," and for that reason, the hearing officer should not have upheld the Group I "when no misconduct was proven." Specifically, the grievant claims that the hearing officer misrepresented the items on the NOIN paperwork. The agency determined that of the five required actions outlined in the NOIN issued in March 2022, two of those required actions remained unsatisfactory.¹⁶ The hearing officer explicitly refers to these two actions in his decision,¹⁷ but the grievant believes that the actions he included are not consistent with the actions in the NOIN review itself. After reviewing the record, EDR finds no real discrepancy between the hearing decision's account of the required actions and the NOIN review itself. The only noticeable discrepancy is that the NOIN review mentions a third unsatisfactory action, to "[p]rovide your plan to streamline the invoice payment process for the RBO," that is not mentioned in the decision.¹⁸ However, this is likely because the review states that the action was noted as completed on April 11, 2022.¹⁹

When EDR considers parties' claims on appeal of inconsistent or inaccurate facts, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.²⁰ EDR therefore finds that the hearing officer's conclusions are based upon evidence in the record and the material issues of the case, and that there was no abuse of discretion by the hearing officer in those findings. Accordingly, EDR declines to disturb the hearing decision on these grounds.

The grievant also claims inconsistent or inaccurate facts as to each of the three instances of conduct that the hearing officer focuses on in his discussion. The first of these relates to the grievant's communication with an employee who reported to the grievant, and the employee's dissatisfaction with the grievant's management leading to the employee's resignation.²¹ The grievant argues on appeal, coupled with her testimony, that the employee received sufficient training and the grievant communicated with her effectively. The hearing officer agreed in his

¹⁵ *Grievance Procedure Manual* § 5.8(2).

¹⁶ Agency Ex. 10.

¹⁷ Hearing Decision at 2-3.

¹⁸ Agency Ex. 10.

¹⁹ *Id.*

²⁰ *See, e.g.*, EDR Ruling No. 2020-4976.

²¹ Hearing Decision at 3.

decision with the grievant that the employee was frequently out of the office, but nevertheless found that the agency presented sufficient evidence that the employee received inadequate training, was not adequately supervised, and did not want to work with the grievant.²² Again, disputed facts are a determination left solely to the hearing officer, and the record appears to support the hearing officer's findings. Additionally, the level of evidence of misconduct an agency must present to support the issuance of a Group I Written Notice, which may be appropriate for any instance of "unsatisfactory performance," is not high.²³

Here, an agency witness testified that the employee had an exit interview with Human Resources and stated that she was leaving because of the "poor management" of the grievant, particularly by being given busy work and a lack of substantial training.²⁴ The grievant disputes this in her testimony and her appeal, arguing that some training is required from her employees before they are able to access certain materials required for her own training -- in essence arguing that she was following agency procedure.²⁵ However, the hearing officer's determination that the agency met the level of evidence required to support a Group I is supported by the record. Thus, we cannot say that the hearing officer abused his discretion in finding that record evidence supported the Group I Written Notice. Accordingly, we decline to disturb the decision on these grounds.

Next, the grievant claims that she acted properly regarding another one of her subordinates requesting leave for vacation. She argues that there is no specific time required in which to approve a leave request, per DHRM Policy 4.10. Nevertheless, the hearing officer found that the agency provided sufficient evidence to show that the employee became frustrated because the grievant did not approve the leave request "on a timely basis."²⁶ The grievant testified that she did what she felt was best by continuing to delay the employee's leave request so she could ask additional questions, and that she spoke to her in January 2022.²⁷ For similar reasons as before, EDR finds that the hearing officer did not abuse his discretion by finding that record evidence supports the agency's position. While the grievant may be correct that Policy 4.10 does not explicitly require a deadline to respond to a leave request, if the agency determines, for example, that such delay is inconsistent with its expectations of supervisors, that is a sufficient reason to issue a Group I Written Notice for unsatisfactory performance. Accordingly, EDR declines to disturb the hearing decision on these grounds.

Finally, the grievant claims that unlike the hearing officer's determination, her handling of the motor grader lease extension was proper and did not rise to the level of a Group I Written Notice. The hearing officer found that the grievant "expressed reluctance to extend the lease since new equipment had been ordered," and because of this, the Residency Administrator had to go around the grievant and get his assistant to have the lease extended.²⁸ Further, the hearing officer concluded that there was sufficient evidence to support the finding that the grievant did not focus

²² *Id.* at 3-4.

²³ See DHRM Policy 1.60, *Standards of Conduct*, Att. A: "Examples of Offenses Grouped By Level."

²⁴ Hearing Recording at 3:21:45-3:24:00 (Agency witness testimony); Agency Ex. 2 at 20; see also Agency Ex. 10 at 72.

²⁵ Hearing Recording at 3:53:50-3:55:00 (Grievant testimony); see Grievant Ex. 1 at 25-26.

²⁶ Hearing Decision at 4.

²⁷ Hearing Recording at 4:02:30-4:04:45 (Grievant testimony).

²⁸ Hearing Decision at 3.

on ensuring that there was no gap between the leases, which was the priority of the agency.²⁹ While the grievant appears to assert that her actions were an attempt to follow agency policy, the record evidence supports the hearing officer's findings as to the agency's dissatisfaction with how the grievant handled the matter overall.³⁰ For the foregoing reasons, EDR finds no abuse of discretion by the hearing officer in his finding that the agency provided sufficient evidence and declines to disturb the hearing decision on these grounds.

Retaliation

Finally, the grievant has asserted retaliation throughout the grievance process and on appeal. To prevail at a hearing on a claim that the agency's disciplinary action was improperly motivated by retaliation, a grievant must ultimately prove by a preponderance of the evidence that, but for her engagement in an activity protected from such retaliation, the agency would not have taken its disciplinary action against her.³¹ The hearing officer considered the evidence in the record and found that while the grievant brought up the issue of retaliation, the agency showed that an investigation was conducted into this claim and that the conclusions of the investigation were unfounded.³² Further, the hearing officer found that there was an insufficient relation between the grievant's disciplinary action and her raising concerns about how the agency handles inventory reports.³³ The hearing officer determined that the grievant did not meet her burden of proof to establish her retaliation claim.³⁴

Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. As discussed above, the agency presented sufficient evidence to support its decision to issue the Written Notice to the grievant. The evidence in the record supports the hearing officer's apparent conclusion that the agency's decision to discipline the grievant did not have a retaliatory motive. EDR has reviewed nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motivation for issuing the discipline was in any way unreasonable or inconsistent with the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and we cannot conclude that the hearing officer's decision on this issue constitutes an abuse of discretion in this case. Considering that the grievant bore the burden to prove retaliation by a preponderance of the evidence,³⁵ EDR will not disturb the hearing decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final

²⁹ *Id.* at 4.

³⁰ *See id.* at 3-4.

³¹ *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).

³² Hearing Decision at 3.

³³ *Id.* at 4.

³⁴ *See id.*

³⁵ *See Rules for Conducting Grievance Hearings* § VI(B)(1). EDR's analysis of these claims is based on a review of the evidence admitted into the hearing record by the hearing officer.

hearing decision once all timely requests for administrative review have been decided.³⁶ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.³⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁸

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³⁶ *Grievance Procedure Manual* § 7.2(d).

³⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).